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5 **NOT FOR PUBLICATION**
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Julia Ann Talley,) No. CV-08-2165-PHX-FJM
10 Plaintiff,) **ORDER**
11 vs.)
12)
13 Pembroke Occupational Health, Inc.,)
14 Defendant.)
15

16 The court has before it defendant's motion for partial summary judgment (doc. 41),
17 plaintiff's response (doc. 45), and defendant's reply (doc. 49). We also have before us
18 plaintiff's motion for summary judgment (doc. 43), defendant's response (doc. 47), and
19 plaintiff's reply (doc. 50).

20 **I**

21 Plaintiff Julia Talley worked as a salesperson for Pembroke Occupational Health,
22 Inc., a company providing pre-employment drug screening for client companies. On July 11,
23 2003, she entered into a written employment contract with Pembroke that described the
24 terms and conditions of her employment and compensation. PSOE, exhibit 1 ("employment
25 contract"). The agreement stated that "Commissions of 5% of revenue will be paid for 24
26 months beginning with the first month that the client is billed. Beginning month 25, 1% of
27 revenue will be paid until your termination of employment with Pembroke." Id. The
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1 contract further provided that “Commissions will be paid on all fees to the clients sold by you
2 except the cost of collection fees.” Id.

3 In October 2004, plaintiff secured a contract with the Department of Interior (“DOI”).
4 PSOF ¶ 11. Due to the nature of the contract, the commission structure was modified for this
5 client, id., however, the modified agreement was not reduced to writing. Talley contends that
6 she was entitled to receive 2% for all revenues, including “collection fees,” collected from
7 the DOI for the first 3 years of the contract, and 1% thereafter until termination of her
8 employment. Id. ¶¶ 11, 13; Talley Deposition at 167-68. Pembroke paid Talley 2%
9 commissions on the DOI contract for almost a year from December 2004 through October
10 2005. PSOF ¶ 14; DCSOF ¶ 14. In December 2005, Pembroke stopped paying Talley DOI
11 commissions, claiming that the contract was not profitable. Diveley Deposition at 49. She
12 was then told in May 2006 that she was not receiving DOI commissions because DOI was
13 in arrears in its payments. However, even after Pembroke received the past due DOI
14 payments, it neither informed Talley of the payments, nor paid her commissions on the
15 revenue. PSOF ¶ 28. Pembroke eventually renegotiated the terms of the agreement with
16 DOI in order to make the pricing structure profitable. Cametas Deposition at 16.

17 Talley did not receive any commission payments on the DOI account after December
18 2005, although DOI remained a Pembroke client. Pembroke stopped paying Talley
19 commissions on all of her accounts as of January 2008, although she remained employed
20 with Pembroke until January 2010. PSOF ¶ 43.

21 Talley filed this action against Pembroke for breach of the employment contract on
22 October 22, 2008.

23 II

24 Pembroke seeks partial summary judgment on Talley’s claim for commissions on
25 the DOI account, asserting that it is barred by the statute of limitations. It argues that because
26 Talley knew that the DOI commission payments stopped in December 2005, she had until
27 December 2006 to file this claim. It therefore contends that her October 2008 claim is time-
28 barred.

1 A claim for breach of employment contract must be filed within one year after the
2 cause of action accrues. A.R.S. § 12-541(3). Generally, a cause of action accrues and the
3 statute of limitations begins to run when one party is able to sue another. Gust, Rosenfeld
4 & Henderson v. Prudential Ins. Co., 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995).
5 However, under the “discovery rule,” when the injury or the act causing the injury has been
6 difficult for the plaintiff to detect, the statute of limitations does not begin to run until the
7 plaintiff knows or with reasonable diligence should know of the facts underlying the alleged
8 breach. Id. 591, 898 P.2d at 969. The discovery rule is premised on the notion that “it is
9 unjust to deprive a plaintiff of a cause of action before the plaintiff has a reasonable basis for
10 believing that a claim exists.” Id. at 589, 898 P.2d at 967.

11 Although Talley was aware that Pembroke had stopped paying DOI commissions in
12 December 2005, she repeatedly inquired into the status of those payments while Pembroke
13 provided varying excuses for the delay. Pembroke’s president, Stefan Cametas, told Talley
14 in December 2005 that she would no longer receive DOI commission payments. DSOF ¶ 7.
15 In May 2006, Pembroke’s CFO told Talley that her commission payments were delayed
16 because DOI’s payments were past due. PCSO ¶ 15. Over the course of many months,
17 Talley was told that the DOI commissions were not paid because DOI was in arrears, id., that
18 the CFO is “swamped” and is trying to hire additional help, id. ¶¶ 18-19, that the CFO was
19 not able to calculate her commissions in time for a fourth quarter commissions check, id. ¶
20 31, that a “revenue posting delayed [her] paycheck,” id., that the “systems were broken” so
21 there was a problem with closing the books, id. ¶ 33, and ultimately the CFO explained that
22 he believed Talley had received an “overpayment,” yet no overpayment calculation was
23 produced, id. ¶¶ 38-39. As late as October 9, 2008, Pembroke’s owner, Jon Cametas
24 continued to assure Talley that he was working on the commission calculation. Id. ¶ 70.

25 Because of Pembroke’s ongoing assurances and excuses, Talley did not have a
26 reasonable basis for believing that she had a claim until well into 2008. We conclude that
27 Talley’s claim for DOI commissions is timely. Pembroke’s motion for partial summary
28 judgment is denied (doc. 41).

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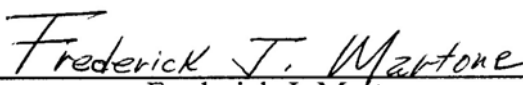
1 Pembroke had the legal authority to cancel the commissions agreement if the underlying
2 contract was unprofitable. Pembroke presents no support for this position and thus it will
3 not serve to defeat summary judgment on this issue. We conclude that Pembroke had an
4 obligation to pay Talley commissions on the DOI account and that it breached its obligation
5 by failing to pay Talley any DOI commissions after December 2005. The amount of the
6 damages on this claim remains open.

7 Other issues of material fact exist that preclude summary judgment. For example, the
8 question of whether Talley was entitled to receive commissions on all DOI revenue, or
9 whether “collection fees” were to be deducted is unresolved. An issue also exists as to
10 whether Pembroke’s CFO applied the incorrect commission percentage entitling it to a set-
11 off against Talley’s damages claim. An issue also exists as to whether Pembroke can show
12 that a reasonable good faith dispute supported its decision to withhold Talley’s wages as far
13 back as December 2005. See A.R.S. § 23-352(3). Because these and other factual issues
14 remain, we deny Talley’s motion for summary judgment.

15 **IT IS ORDERED DENYING** Pembroke’s motion for partial summary judgment
16 (doc. 41).

17 **IT IS FURTHER ORDERED GRANTING IN PART AND DENYING IN PART**
18 Talley’s motion for summary judgment (doc. 43). The motion is granted as to liability on
19 Talley’s breach of contract claim regarding the DOI account. The motion is otherwise
20 denied.

21 DATED this 21st day of April, 2010.

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26 Frederick J. Martone
27 United States District Judge
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